UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HON. DOUGLAS F. McCORMICK, U.S. MAGISTRATE JUDGE

Tentative Ruling on Law & Motion Matter

DATE: October 20, 2015

CASE: E4 Strategic Solutions, Inc., et al. v. Pebble Limited Partnership,
SA MC 15-00022-DOC (DFMx)

RE: (1) Petitioner's Petition to Quash Subpoenas (Dkt. 1); and
(2) Respondent's Motion to Transfer (Dkt. 11).

This matter arises out of ongoing disputes over the enforcement of subpoenas issued by the United States District Court for the District of Alaska in connection with the pending action, Pebble Limited Partnership v. Environmental Protection Agency, et al., Case No. 14-0171 (the "Underlying Action"). Respondent Pebble Limited Partnership ("PLP") is the plaintiff in the Underlying Action. The defendants are the Environmental Protection Agency and its Administrator, Gina McCarthy (collectively, the "EPA").

PLP alleges in the Underlying Action that the EPA "established and/or utilized" three advisory committees to assist "in developing and implementing an unprecedented plan to assert EPA's purported authority under Section 404(c) of the federal Clean Water Act […] in a manner that will effectively preclude [PLP] from exercising its right through the normal permitting process to extract minerals from the Pebble Mine deposit in Southwest Alaska." Dkt. 12, Exh. 9 ¶¶ 2-3. PLP contends that these three committees were established and/or utilized by the EPA in violation of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 2 §§ 1-16. Id. ¶¶ 158, 175, 192. PLP's Second Amended Complaint asserts causes of action under the Administrative

Procedure Act ("APA"), 5 U.S.C. § 551 et seq., based on claims that the EPA violated FACA in connection with those committees. Id. ¶¶ 159, 176, 193.

The three "committees" that were allegedly established and/or utilized by the EPA in violation of FACA are identified by PLP as: (1) the Anti-Mine Coalition; (2) the Anti-Mine Scientists; and (3) the Anti-Mine Assessment Team. Id. ¶ 4. PLP alleges that the Anti-Mine Coalition ("Coalition") was formed in 2008 by the members of the Coalition and "[i]n the ensuing months, [was] transformed into an advisory committee that was under the management and control of [the EPA]." Id. ¶¶ 33-35. Wayne Nastri, Shoren Brown, the Bristol Bay Regional Seafood Development Association, Robert Waldrop, Tim Troll, the Alaska Conservation Foundation, and Samuel Snyder are all alleged to be part of the Coalition. Id. ¶ 31.

Petitioners Wayne Nastri ("Nastri") and E4 Strategic Solutions Inc. ("E4") (together, "Petitioners") initiated this action to challenge the validity of, and compliance with, subpoenas served on them in California, see Dkt. 1, Exhs. 3 & 4 (the "Subpoenas"). Dkt. 1. The Subpoenas are virtually identical to the subpoenas served by PLP on other non-parties Samuel Snyder ("Snyder"), see Dkt. 12, Exh. 14; the Alaska Conservation Foundation ("ACF"), see Dkt. 12, Exh. 13; and Shoren Brown ("Brown"), see W.D. Washington Dkt. 1, Exh B.[1]

On September 3, 2015, Snyder and ACF filed in the District of Alaska a joint motion to quash the subpoenas served on them by PLP. See D. Alaska Dkt. 159.[2] On September 8, 2015, PLP filed a motion to compel responses to subpoenas it served on Snyder, ACF, Bristol Bay Regional Seafood Development Association, and Robert Waldrop. See D. Alaska Dkt. 162. Both motions have been fully briefed.

On September 9, 2015, Brown initiated an action in the United States District Court for the Western District of Washington, Case No. 15-1522, and moved to quash the subpoena served on him by PLP. See W.D. Washington Dkt. 1. On September 21, 2015, PLP moved to transfer Brown's motion to

[1] "W.D. Washington Dkt." refers to the Western District of Washington's CM/ECF numbers for Case No. 15-1522.

[2] "D. Alaska Dkt." refers to the District of Alaska's CM/ECF numbers for the Underlying Action, Case No. 14-0171.

quash to the District of Alaska. See W.D. Washington Dkt. 5. Both motions have been fully briefed.

In this case, Petitioners filed their petition to quash the Subpoenas on September 15, 2015. See Dkt. 1. PLP filed its motion to transfer the petition to quash to the District of Alaska on September 21, 2015. See Dkt. 11. These motions are now pending before the Court.

PLP also requests that the Court take judicial notice of the orders and pleadings from the Underlying Action, and related actions. See Dkt. 12 at 10, n.2. Under Rule 201 of the Federal Rules of Evidence, the court may judicially notice a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." See Fed. R. Evid. 201(b). "Because court filings are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,' pleadings filed and orders issued in related litigation are proper subjects of judicial notice under Rule 201." McVey v. McVey, 26 F. Supp. 3d 980, 984 (C.D. Cal. 2014) (collecting cases). Accordingly, the Court takes judicial notice of the dockets, pleadings, and court orders in the Underlying Action, Western District of Washington Case No. 15-1522, and District of Alaska Case No. Case No. 14-0199. See, e.g., In re Zulueta, 520 F. App'x 558, 559 (9th Cir. 2013) (taking judicial notice of the docket and dismissal order in the underlying bankruptcy proceedings); Rodriguez v. Disner, 688 F.3d 645, 660 (9th Cir. 2012) (granting requests for judicial notice of briefs filed in related cases).

Legal Standard

Subpoenas are governed by Rule 45 of the Federal Rules of Civil Procedure, which was substantially amended effective December 1, 2013. See Fed. R. Civ. P. 45(f) and Adv. Comm. Notes. "As amended, a subpoena must be issued by the court where the underlying action is pending, but challenges to the subpoena are to be heard by the district court encompassing the place where compliance with the subpoena is required." Woods ex rel. U.S. v. SouthernCare, Inc., 303 F.R.D. 405, 406 (N.D. Ala. 2014) (citing Fed. R. Civ. P. 45(a)(2), (d)(3)(A)). Subsection (f) of Rule 45 was added to explicitly permit the transfer of subpoena-related motions from the court where compliance is required to the issuing court. Such a transfer is only permissible in two circumstances: (1) the person subject to the subpoena consents; or (2) the court finds exceptional circumstances. Fed. R. Civ. P. 45(f). Here, Petitioners have

not consented to the transfer, so PLP must demonstrate that exceptional circumstances exist.

The Advisory Committee Notes provide some guidance as to when exceptional circumstances may be found:

> In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion.

Adv. Comm. Note to 2013 Amendment to Fed. R. Civ. P. 45. However, "[t]he Advisory Committee Notes do not provide an exhaustive list of all circumstances in which transfer is appropriate under Rule 45(f)." Agincourt Gaming, LLC v. Zynga, Inc., No. 14-0708, 2014 WL 4079555, at *6 (D. Nev. Aug. 15, 2014). Courts have also considered a number of factors relating to the underlying litigation including the "the complexity, procedural posture, duration of pendency, and the nature of the issues pending before, or already resolved by, the issuing court in the underlying litigation." Judicial Watch, Inc. v. Valle Del Sol, Inc., 307 F.R.D. 30, 34 (D.D.C. 2014) (collecting cases). Accordingly, "the question before the Court on the motion to transfer involves a balancing test—whether the circumstances favoring transfer outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion." Valle del Sol, Inc. v. Kobach, No. 14-MC-219, 2014 WL 3818490, at *3 (D. Kan. Aug. 4, 2014).

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Discussion

Exceptional Circumstances

After consideration of the factors outlined above, the Court finds that exceptional circumstances exist warranting transfer of Nastri and E4's petition to quash. First, the potential of disrupting the management of the Underlying Action bolsters PLP's argument for transfer. As discussed above, the subpoenas served on Nastri and E4 are virtually identical to the subpoenas served on ACF, Snyder, and Brown. Further, Nastri and E4 do not dispute that their petition to quash raises the same arguments raised in ACF and Snyder's motion to quash pending before the District of Alaska. While Petitioners acknowledge that the risk of inconsistent rulings is "[t]he most significant factor cited in decisions granting transfer," they contend that this factor applies only where there is "a *pre-existing* ruling by the court in the underlying action on the same issues raised by the subpoenaed parties." See Dkt. 12 at 28. The Court disagrees that this distinction is meaningful in the context of the parties' discovery dispute.

It is true that "[m]ost nonparty subpoenas will raise issues that are related to the underlying litigation and that are somewhat likely to require future resolution by the issuing court." Woods, 303 F.R.D. at 408. Thus, if the mere likelihood of inconsistent rulings is the primary concern, then transfer would be appropriate in almost every case. See id. However, a ruling by the District of Alaska on a motion to quash raising substantially similar objections to virtually identical subpoenas is certain to occur because ACF and Synder's motion to quash has been fully briefed and is awaiting decision by Judge Holland. Moreover, numerous district courts have found exceptional circumstances where, as here, there is a subpoena-related motion pending in the issuing court that raises similar arguments to those raised in the motion sought to be transferred. See, e.g., Agincourt Gaming, 2014 WL 4079555 at *7 (finding that transfer of subpoena-related motions to the Delaware court was appropriate where "some overlapping discovery issues have already been briefed in the District of Delaware, thus creating the possibility of inconsistent rulings"); F.T.C. v. v. A± Fin. Ctr., LLC, No. 13-MC-50, 2013 WL 6388539, at *3 (S.D. Ohio Dec. 6, 2013) (finding that transfer to the Southern District of Florida was "warranted to avoid inconsistent outcomes and for purposes of judicial economy" where a similar motion to compel that dealt with a similar subpoena directed at a different party was already pending before the Florida court).

The cases cited by Petitioners in support of the proposition that, in the absence of a pre-existing ruling by the issuing court, "a ruling by the district of compliance is unlikely to cause disruption," are readily distinguishable. See Dkt. 12 at 29-30. In Garden City Employees' Ret. Sys. v. Psychiatric Solutions, Inc., the court explained that there were no exceptional circumstances because the party seeking transfer did not show that the issues presented by the motion at issue were likely to recur and failed to identify any discovery disputes similar to the one before the court. See No. 13-238, 2014 WL 272088, at *3 & n.3 (E.D. Pa. Jan. 24, 2014). In Woods, the court held that an overlap in "concerns of relevance that are almost certainly in common with the myriad discovery disputes in the underlying litigation. … is an insufficient reason, standing alone, to warrant transfer of the motions." See 303 F.R.D. at 408 (emphasis added). Notably, the court indicated that a different result would have been reached in a "situation[] in which the issues are likely to arise in many districts." See id. at 408-09 ("the risk of overlapping future rulings is not an exceptional circumstance (absent multi-district concerns)").

In addition to ACF and Synder's motion to quash pending before the District of Alaska, a motion to quash was recently filed in the Western District of Washington by Petitioners' counsel on behalf of Brown that raises the same arguments contained in Petitioners' petition to quash. "Thus, identical issues have arisen in discovery in multiple districts, with the possibility that multiple courts will issue varying, and potentially inconsistent rulings, weighing heavily in favor of transfer." Kobach, 2014 WL 3818490 at *4. And, as PLP points out, the purported "*de facto* federal advisory committees alleged in the [Underlying] Action were composed of dozens of members from across the country, including Southern California, the Washington, DC metro area, the Pacific Northwest, and Alaska (among other locations), which means that the depositions and documents discovery will occur in multiple jurisdictions." See Dkt. 12 at 10-11. The motions already pending in three states, coupled with the potential for additional motions being filed in other states, presents a danger of inconsistent rulings. See Wultz v. Bank of China, Ltd, 304 F.R.D. 38, 46 (D.D.C. 2014) ("This potential for inconsistent rulings should be avoided and weighs in favor of a single judicial officer deciding all of these disputes.").

Finally, the interest of judicial economy weighs strongly in favor of transfer. Judge Holland is in a better position to rule on Nastri and E4's petition to quash due to his "familiarity with the full scope of issues involved

as well as any implications the resolution of the motion will have on the underlying litigation." See id. Indeed, the parties dispute whether Judge Holland has already ruled that non-party discovery is permissible. See Dkt. 12 at 4, 30. For example, PLP argues that Petitioners are seeking "a contrary ruling in this Court" given that "the Alaska Court already has authorized non-party discovery with respect to two third parties, including Phil North, who, like Nastri, is a former EPA employee." See id. at 4, 15-16. By contrast, Petitioners argue that the ruling regarding Phil North is inapposite because he was a key official on Bristol Bay while employed by the EPA, unlike Nastri. See id. at 30. Petitioners also argue that Judge Holland's order requiring Alaska Communications Service, an email service provider, to preserve documents did not amount to an approval of non-party discovery. See id. at 16-17. This dispute appears to be related to the parties' disagreement as to whether Wyoming v. U.S. Dep't of Agric., 208 F.R.D. 449 (D.D.C. 2002), precludes non-party discovery in a FACA case and whether the EPA is the only proper source of discovery. The applicability of Wyoming is at issue in both Nastri and E4's petition to quash as well as in the motions pending before the District of Alaska and the Western District of Washington. Accordingly, Judge Holland, and not this Court, is in the best position to interpret his prior discovery orders and to determine the scope of non-party discovery in the Underlying Action.

This is especially true given that Judge Holland is also managing a related case arising from PLP's Freedom of Information Act ("FOIA") requests to the EPA, Pebble Limited Partnership v. United States Environmental Protection Agency, Case No. 14-0199 (the "FOIA Action"). Judge Holland indicated that the court will evaluate discovery from the Underlying Action to help determine whether the EPA's FOIA search was adequate: "It is the court's view that the discovery posture of the [Underlying Action] will afford the parties and the court an opportunity to take a second look at the adequacy of the EPA's search for documents that may be relevant to the [Underlying Action]." Dkt. 12, Exh. 23 at 5-6. Therefore, the conclusion that transfer is warranted is bolstered by the fact that an inconsistent ruling by this Court regarding the scope of third party discovery could risk disrupting Judge Holland's management of both the Underlying Action and the related FOIA Action.

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Burden on Nastri and E4

As previously discussed, "[t]he primary factor to consider in balancing the above is any burden imposed on local non-parties by transferring the motions to the issuing court." Agincourt Gaming, 2014 WL 4079555 at *7. Petitioners argue that a substantial interest in local resolution exists because: (1) Nastri is an individual and E4 is a small business with limited resources; (2) although Petitioners retained counsel located in Washington, DC, there is a significant difference in cost between "[t]ravel from DC to Anchorage [which] is much longer and more expensive than is travel from DC to Los Angeles"; and (3) "[a] transfer would impose a financial burden that likely would prevent counsel from litigating this motion in a way that counsel for the nonparties believes is in the best interest of their clients." Dkt. 12 at 36-37. The Court finds that Nastri and E4 have not offered evidence of burden rising to the level needed to outweigh the exceptional circumstances warranting transfer.

As the court noted in Chem-Aqua, Inc. v. Nalco Co., No. 14-MC-71, 2014 WL 2645999, at *3 (N.D. Tex. June 13, 2014), "[a]lmost any subpoenaed party could make the same undue burden arguments that [Petitioners] make[] here." That being said, the Court is mindful that Nastri is an individual person and E4 is a small company rather than a national corporation. See In re Subpoena to Kia Motors Am., Inc., No. 14-315, 2014 WL 2118897 at *1 (C.D. Cal. Mar. 6, 2014) (noting that transfer "would not significantly burden Kia, as Kia is a national automotive company, not an individual California resident"). "This is by no means a dispositive consideration, but it is relevant as the Court evaluates any burden imposed." Agincourt Gaming, 2014 WL 4079555 at *8.

Additionally, aside from their conclusory statements to the contrary, Petitioners have not produced any competent evidence tending to show that litigating their petition to quash in Alaska would require travel to Anchorage or that the associated costs would alter their litigation strategy. First, "[t]ransferring a motion to the jurisdiction where the underlying litigation is pending that will require few, if any, modifications of the written submissions, does not rise to the level of unfair prejudice." See Moon Mountain Farms, LLC v. Rural Cmty. Ins. Co., 301 F.R.D. 426 (N.D. Cal. July 10, 2014) (quoting Wultz, 304 F.R.D. at 45). Second, District of Alaska Local Rule 5.3 authorizes electronic filing of all pleadings, papers, and other documents. Third, Petitioners' counsel Joshua A. Levy has already been admitted pro hac vice in the Underlying Action. See Dkt. 23, Exh. 43.

Moreover, there is no indication that a hearing would be held on the petition to quash unless requested by the parties, see D. Alaska Local Rule 7.2, and in such circumstances, it does not appear that personal attendance would be required. District of Alaska Local Rule 7.3 allows the parties, counsel, and witnesses to participate telephonically in any hearing for good cause and in the absence of substantial prejudice to any party. Because PLP has cited this rule in support of its argument that transfer "would not require [Petitioners] to set foot outside of [California]," this serves as a representation to the Court that PLP would not oppose such a request. See Dkt. 12 at 19. Further, judges are encouraged to "permit telecommunications" to minimize travel costs after a transfer pursuant to Rule 45(f). See Adv. Comm. Note to 2013 Amendment to Fed. R. Civ. P. 45. Thus, Nastri and E4 have not shown that litigating their petition to quash in the District of Alaska "will cost very much at all." See Moon Mountain Farms, LLC v. Rural Cmty. Ins. Co., 301 F.R.D. 426, 430 (N.D. Cal. 2014).

PLP also notes that Nastri filed a declaration in the Underlying Action in support of the opposition to PLP's motion to compel filed by Robert Waldrop ("Waldrop") and the Bristol Bay Regional Seafood Development Association ("BBRSDA"), who are represented by the same counsel as Petitioners. [3] Dkt. 23, Exh. 42. The Court agrees with PLP that Nastri's voluntary decision to become involved in the Underlying Action "undercuts his burden argument" and demonstrates his and his counsel's willingness to participate in proceedings in Alaska when it suits their needs. PLP also argues that Petitioners' "decision to hire counsel in DC further undercuts [their] purported concern with staying local and minimizing costs." Dkt. 23 at 1, n.1. The Court is, however, satisfied with Petitioners' explanation that they "have retained counsel in Washington, D.C. because it was more efficient and cost-effective for several of the subpoenaed non-parties around the country to have one lawyer defend them against the identically abusive, broad subpoenas."[4]

[3] While the subpoenas served on Waldrop and the BBRSDA contain document requests different from those contained in the subpoenas served on Petitioners, the arguments raised in their opposition to PLP's motion to compel are substantially similar to those raised in Nastri and E4's petition to quash.

[4] This argument undermines somewhat Petitioners' position that exceptional circumstances warranting transfer do not exist. Petitioners argue that it is more "efficient and cost-effective" for them to share counsel, and presumably a common litigation strategy, to challenge identical subpoenas, but at the same time, do not afford those same considerations to the Court. Indeed, Petitioners appear to ignore the fact that it would be more efficient to have the same judicial officer decide the motions involving identical

Dkt. 25 at 5. In any event, the Court is not persuaded by Petitioners' arguments because they failed to identify any meaningful burden they would face by transferring their petition to quash to the District of Alaska.

Conclusion

For the foregoing reasons, the Court finds that PLP has shown that exceptional circumstances exist, permitting transfer to the District of Alaska. Petitioners have failed to show undue burden outweighing the importance of preventing inconsistent rulings, the risk of disrupting management of the Underlying Action and the FOIA Action, and preserving judicial economy. Accordingly, the Court GRANTS PLP's motion, and the Clerk of the Court is directed to transfer this case to the District of Alaska for consideration of Nastri and E4's petition to quash.[5]

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subpoenas due to Judge Holland's familiarity with the issues involved and to avoid the possibility of inconsistent rulings.

[5] The Court finds that it has authority to transfer this action to the District of Alaska because it is a non-dispositive matter under 28 U.S.C. § 636(b)(1)(A). See Agincourt Gaming, 2014 WL 407955 at *2.